Filed 6/2/04 P. v. Eldridge CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM M. ELDRIDGE, Defendant and Appellant.	B165789 (Los Angeles County Super. Ct. No. MA019524)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carlos E. Velarde, Judge. Affirmed as Modified.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

William M. Eldridge appeals from the judgment entered following a jury trial in which he was convicted of assault with a firearm, making criminal

threats, kidnapping, and causing corporal injury to his child's parent. (Pen. Code, §§ 245, subd. (a)(2); 422; 207, subd. (a); 273.5, subd. (a).) The jury also found that appellant personally used a firearm (§ 12022.5, subd. (a)(1) with respect to the assault, threat and kidnapping counts and § 12022.53, subd. (b) with respect to the kidnapping count only). He was sentenced to 18 years in state prison. He appeals, contending that his due process rights were violated when the court allowed evidence of a prior uncharged offense without adequate notice, and in the alternative, that he received ineffective assistance of counsel because his attorney failed to make a timely objection to such evidence. He also contends that he is entitled to additional presentence custody credit. We find these contentions to be without merit, but strike one of the fines imposed, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and Charmain Davison had been romantically involved since 1994. They had three children together and sometimes lived together. At the time of the incident, appellant had recently moved out of their apartment in Lancaster and was living at his mother's house. Appellant worked as a security guard and in that capacity carried handcuffs, pepper spray and two firearms.

At approximately 3:00 a.m. on Saturday October 30, appellant called Davison and asked her to bring some of his clothes and personal items to a nearby police station. Davison thought the request was strange, so she told her cousin to call the police if she did not return in five minutes. Davison walked out to her car, and as she got in, appellant appeared, produced a firearm and told her to move over. He then handcuffed her left hand to his right hand and said she was "going to die tonight." He then said he was "just playing" and wanted to talk to her, but had to go to his office to drop off some paperwork. He then took the handcuffs off

and gave her the gun. They went to the office and appellant got out and gave his radio to someone standing outside. He then reentered the car and said they needed to go to Palmdale. On the way there, he started asking Davison questions about another man she had been seeing. He accused her of lying and hit her hard on the face. He then bent one of her fingers back and said he would break it if she did not tell him where the other man lived. Appellant stopped in Palmdale and got out of the car. Davison took the keys out of the ignition. As she tried to get out, appellant grabbed her, took the keys back and again handcuffed her left wrist to his right wrist. Appellant drove for about 20 to 30 minutes towards the desert and stopped in a remote area. He said he could not believe that he had hit her and wanted to kill himself. Davison removed the key to the handcuffs from his shirt pocket and unlocked herself. They continued to talk, and appellant repeated that he wanted to kill himself. Davison told him that if he got out and sat in the back seat, she would drive him home to see their children. Appellant got out and Davison immediately locked the doors and drove off. She looked through the rear view mirror and it looked as if he was getting ready to shoot her.

Davison went to the Palmdale sheriff's station and told them only that appellant had been talking about shooting himself and that she had left him in the desert. They told her to meet them where she had left appellant. When they arrived, she told the deputies that there was a gun under the seat of the car. They told her to go home and put the weapon in a safe place. Appellant arrived at her home later than morning and either her son or her cousin let him in. Davison fell asleep and appellant was gone when she woke up.

The following evening around 2:00 a.m., appellant appeared. He said he was moving to Chicago and wanted Davison to go with him. When Davison said she did not want to move, appellant got upset, took his firearm out of his belt and told her to take off her dress. He laid his weapon down on the bed and they

had sexual intercourse. Appellant then left for work. The next day, Davison gave the police a videotaped statement and then went to the hospital for a rape examination.[1]

Approximately ten days later, Davison's mother, Tanya Andrus, secretly taped a conversation she had with appellant, in which he admitted handcuffing Davison and hitting her in the face.

At trial, evidence was introduced that in September 1996, appellant was in the car with Davison while they argued. Appellant became upset, produced a handgun and hit her in the head with the gun. Davison called the police, and they interviewed appellant, but he was never charged with any crimes. An expert testified about battered women's syndrome. The tape Davison's mother made was played for the jury.

Los Angeles County Sheriff's Detective Darren Hager interviewed appellant after he was arrested on November 2, 1999. Appellant told Hager that Davison asked him if she could accompany him to work, and when she got out of the car, she hit herself in the face with the car door.

Appellant testified in his own defense. He claimed that he and Davison were driving around together, and got into an argument. Davison hit him in the eye with a cell phone. He slapped her in the face, her glasses broke, and the lens cut her face. Appellant said he got out of the car at one point and Davison asked him to get back in so they could keep talking. When he declined, Davison drove off without him. He denied threatening to kill himself and denied having a gun. When he went back to his apartment, they continued to discuss their problems and had consensual sex. Later they went to see friends and relatives. He left the house to go to work on Monday, November 1, 1999, and did not see

---

[1] Appellant was charged with rape, but the jury deadlocked on that count.

Davison for several days. He went to the sheriff's station in response to a message left for him at work. He claimed he only told Andrus about the handcuffs because the detective told him it was not against the law to use handcuffs. He denied that the 1996 incident ever occurred.

Raymond Rayford, appellant's friend, testified that appellant and Davison came to his house on October 31, 1999, and visited for about 30 minutes. Davison did not seem to be upset or in distress. Both appellant and Davison appeared to have black eyes.

Sharon Temple, appellant's mother, testified that during the entire time Davison was involved with her son, Davison never complained about any problems. When appellant was released from jail a few days after his arrest, he had a black eye.

On rebuttal, Brandy Roberts, a cousin of Davison's, testified about an incident in February 1999 when appellant called Davison a "bitch" and pushed her down the hallway, holding onto her hair.

Los Angeles County Sheriff's Detective Brian Dunn testified that after an incident in September 1966 between appellant and Davison, he interviewed appellant.

On surrebuttal, appellant denied that the incident described by Brandy Roberts ever took place. He admitted, however, that he had been interviewed in 1996 by a sheriff's deputy.

DISCUSSION

1. *Evidence of Prior Uncharged Acts*

In his opening statement, the prosecutor told the jury that they would hear evidence regarding appellant's "history with [Davison] and his violence with her in the past." Appellant's counsel did not object.

When Davison testified on direct about the 1996 incident, defense counsel objected on the grounds that he had not been given notice that this evidence would be presented. The prosecution argued that the police reports and the videotaped interview referred to the 1996 incident; thus no notice was necessary. The trial court ruled that there was sufficient notice and allowed the evidence.

Evidence Code section 1109 limits the admissibility of evidence of prior misconduct if its probative value is substantially outweighed by its prejudicial effect as outlined in Evidence Code section 352. It also requires 30 days notice to the accused if such evidence is going to be used by the prosecution.[2]

We conclude that any error in admitting the evidence of the 1996 incident was utterly harmless. Appellant admitted on the taped conversation with Andrus that he had handcuffed Davison and struck her. Brandy Roberts testified of a previous incident where appellant had harmed Davison. Appellant's statements to the police were inconsistent. There was ample evidence to convict appellant even if there had been no mention of the 1996 incident. (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1023.)

In addition, because it was unlikely that a different result would have occurred had counsel interposed and earlier or more specific objection, we find no merit in appellant's ineffective assistance of counsel claim. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624, 632; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058.)

---

[2] Section 1109 refers to the provisions of Penal Code section 1054.7, which provides that "disclosures required under this chapter shall be made at least 30 days prior to the trial."

2. *Custody Credits*

Appellant contends that he is entitled to six additional days of custody credit. He bases this calculation on an arrest date of November 1, 1999, and a sentencing date of December 17, 2001, which are the dates used by the trial court in computing the 888 days of custody credit.

According to testimony at trial, however, appellant was arrested on November 2, 1999, released on November 6, 1999, and then rearrested at a later date. Based on this record, it would appear that appellant was awarded too many days of custody credit. We cannot determine the correct number awarded from this record alone, but in any event, appellant's request for additional days has no merit.

3. *Penalty Assessments*

The People contend in their respondent's brief that the trial court failed to impose penalty assessments, claiming that because a $200 domestic violence fine pursuant to Penal Code section 1203.097 was imposed, additional state and county penalty assessments must also be imposed pursuant to Penal Code section 1464 and Government Code section 76000.

In his reply brief, appellant argues that the Penal Code section 1203.097 fine should not have been imposed because that section only applies in cases of domestic violence where probation is granted.

None of these arguments was made at the trial court level. The court's comments at sentencing make it clear that it was imposing the fine pursuant to Penal Code section 1203.097, and not upon any other section.[3] The fine was

---

[3] The court also imposed a $200 parole restitution fine pursuant to Penal Code section 1202.45 and a restitution fine pursuant to Penal Code section 1202.4, subdivision (b).

imposed at the urging of the district attorney and defense counsel made no objection. Because this fine was clearly based upon an erroneous assumption and is therefore not authorized by law, it must be stricken even though the error was not raised until this late date. (*People v. Smith* (2001) 24 Cal.4th 849, 852-854; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1415-1416.)

DISPOSITION

The judgment is modified to delete the $200 fine imposed pursuant to Penal Code section 1203.097, and as modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J. CURRY, J.